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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN MITCHELL CARTER et al., Defendants and Appellants.	B272472 (Los Angeles County Super. Ct. No. TA138048)

APPEAL from judgments of the Superior Court of Los Angeles County, John J. Lonegran, Jr., Judge. Affirmed.

Renee Paradis, under appointment by the Court of Appeal, for Defendant and Appellant Jonathan Mitchell Carter.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant Joshua Earl Charles.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Paul M. Roadarmel and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendants Jonathan Mitchell Carter and Joshua Earl Charles appeal the judgments following their convictions for carjacking and robbery with gun use enhancements. Carter challenges the admission of two items of evidence. We agree the trial court abused its discretion in admitting both pieces of evidence, but we find no prejudice warranting reversal. Charles challenges the trial court's reasonable doubt instruction, but his contention has been rejected in many cases and we see no reason to depart from them. We affirm.

PROCEDURAL BACKGROUND

Following a joint trial, a jury found appellants guilty of two counts of robbery (Pen. Code, § 211)[1] and two counts of carjacking (§ 215, subd. (a)) and found true gun use enhancements (§§ 1203.06, 12022.5, subd. (a), 12022.53, subd. (b)). Carter was sentenced to 15 years in state prison, and Charles was sentenced to 13 years.

FACTUAL BACKGROUND

This case arose from a carjacking on August 26, 2015. That night, victim Donja Brooks was sitting in the driver's seat and victim Bryanna Cotton was sitting in the passenger seat of Cotton's car. While they were talking, Brooks was looking down at his phone. Appellants walked in the middle of the street

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1 All undesignated statutory citations are to the Penal Code unless noted otherwise.

toward the car, then walked past Cotton and she lost sight of them. She heard them say something but did not know what.

About 30 minutes later, a red truck drove slowly past Cotton's car and parked in a nearby school's parking lot. Appellants walked toward the red truck and argued with someone inside. A couple of minutes later, the red truck drove away as appellants remained standing in the middle of the street.

Appellants approached Cotton's car. Carter had a hand under his sweater as he walked toward the driver's side. Charles walked around the parked car in front of Cotton's car and onto the sidewalk. When he neared the passenger side mirror, he pulled a gun. Carter also pulled a gun. Charles pointed the gun at Cotton's face and demanded her things. She gave him her jewelry and money. He also snatched a necklace around her neck.

Brooks was looking at his phone when Carter pointed the gun at his head, demanded his phone, and ordered him out of the car. In shock, Brooks did not take the demands seriously. Carter punched Brooks in the chin and hit the door, saying, "It's not a game. Give me your phone." Brooks got out of the car and handed over his phone. Carter also ordered him to empty his pockets. A car drove by so Carter ordered Brooks back into the car. Once the car was gone, he ordered Brooks back out and to lie on the ground. Brooks gave over his car keys and whatever else he had in his pockets and lay on the ground. Carter took Brooks's phone and keys.

Brooks heard Carter say, "Flip that bitch bra and get her, get her, get her." Charles ordered Cotton out of the car and to lie on the ground as well. Cotton was afraid Charles would shoot her or hit her if she did not comply. Carter entered the driver's

side, Charles entered the front passenger side, and they drove away. Brooks and Cotton ran to Cotton's house nearby and Cotton's mother called the police.

About five to six hours after the carjacking—around 2:00 a.m.—a Los Angeles County sheriff's deputy provided air support to ground deputies searching for appellants. He responded to a location where Cotton's car was spotted and shined the helicopter's lights at the car, which accelerated. The car stopped abruptly and a black male in a black jacket and dark-colored pants jumped out. The car drove away and the deputy in the helicopter followed it. The car struck a parked car and the driver fled into a nearby garage. A deputy on the ground responded with a police dog and found Carter in the garage. He was arrested.

Another deputy responded to the other passenger who had fled the car during the helicopter pursuit. He spotted Charles in the area and detained him. A search of the area yielded a pair of black sweatpants and an Adidas windbreaker jacket. Charles told the deputy he jumped out of the car and ran but stopped running and walked when he spotted the deputy. He took off his clothes to avoid being arrested. He also told the deputy he threw a gun from the car, although he later claimed he did not have a gun. The deputy searched the area Charles indicated but did not find anything relevant.

At the hospital, police searched Carter's clothing and found in his pants pocket two .32-caliber unexpended cartridges and a Nix check cashing identification card with Cotton's name and photograph on it.

During a police interview, Charles again said he threw a gun from the car and gave a location where it could be found. A

semiautomatic pistol was located there with cartridges in the magazine that matched the brand and caliber of the cartridges found in Carter's pants. During Carter's interview, he said he was homeless and asleep in the garage when he was found.

At a field identification, during photographic lineups, and at trial, Brooks and Cotton identified Charles as one of the perpetrators, so his identity was not at issue during trial.

Their identification of Carter was more complicated and the primary issue in his case. Cotton never identified Carter, and at trial she testified she was "a thousand percent sure that [Carter] was not the one that jacked us." She recognized the man who approached Brooks but did not see him in the photographic six-packs she was shown the day after the carjacking or in the courtroom at trial. She denied that she refused to identify him because she was scared of him. During the 911 call immediately after the carjacking, Cotton reported that Brooks had previously seen one of the carjackers and knew him. She did not say she had seen one of the carjackers previously because she was afraid. When police arrived at Cotton's house, both Cotton and Brooks gave physical descriptions of the carjackers (although at trial Brooks did not recall giving descriptions).

Brooks identified Carter in a photographic six-pack shown to him the day after the carjacking. Detective Gustavo Ramirez, the investigator in the case, showed him a first set of photographs, and Brooks asked to see the second set. Detective Ramirez directed him to respond to the first set. Brooks said, "I'm sure of the facial structure, I'm like, 75%, 80%." He did not see tattoos under Carter's eyes because of the hoodie he was wearing, even though in the photograph Carter had tattoos.

At trial, Brooks testified he was not sure about his identification of Carter, and the man who approached his side of the car was not in the courtroom. He testified he thought he was required to circle somebody he recognized in the photographs and did not recall telling Detective Ramirez he was 75 or 80 percent sure of Carter's facial structure. He acknowledged he read the written admonishment about identifying someone but he felt pressure to select someone. He would not identify an innocent person, though.

Brooks did not attend prior court hearings. He "[d]idn't want to take a risk" of "anything bad happening to me or my family." He was still afraid when he testified at trial.

Detective Ramirez opined at trial that Cotton and Brooks refused to identify Carter because they were afraid of retaliation. On cross-examination, he explained Brooks refused to return his phone calls and refused to go to court, which Detective Ramirez interpreted to mean he was afraid. But neither Cotton nor Brooks ever explicitly told him they refused to testify or identify Carter because they feared retaliation.

Although two guns were involved in the carjacking, only the semiautomatic was recovered. Brooks described Carter's gun as a revolver. Cotton described Charles's gun as small with a "ring" in the middle of it. Detective Ramirez later found a photograph depicting Carter holding what appeared to be a small revolver.

A couple of weeks after the carjacking, Brooks and Cotton went to pick up Cotton's car from the towing company. Several items were inside that did not belong to either of them, including a backpack and a gray sweater Cotton identified as belonging to the carjacker on Brooks's side of the car. Many other items were

missing, including Cotton's Nix check cashing card, which the victims never got back.[2]

DISCUSSION

1. Detective Ramirez's Opinion Testimony

Carter argues the trial court erroneously allowed Detective Ramirez to opine that Brooks and Cotton refused to identify Carter because they feared retaliation. We review the admission of evidence for abuse of discretion. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*).)[3]

On direct examination, Detective Ramirez testified he had investigated 800 to 1,000 cases involving violent crime. He was asked, "In that number, how often are victims or witnesses reluctant to share information with you?" A relevance objection was overruled, and he responded, "I would say it depends on the nature of the crime. Typically when it's a violent crime, the majority of the time the victim or witnesses are reluctant to want to cooperate with the investigation."

The prosecutor asked a series of questions about whether Detective Ramirez had spoken to victims about the reasons for their reluctance, but the court sustained defense objections. The prosecutor then asked, "Do you have an opinion as to why Donja Brooks and Bryanna Cotton refused to identify Mr. Carter in this

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[2] In the defense case, Charles's counsel called the deputy who interviewed Brooks and Cotton at Cotton's house and then transported them to the field showup with Charles. Because there is no issue involving Charles's identity as a perpetrator, we need not include these facts.

[3] Charles joins Carter's argument, but because both Cotton and Brooks unequivocally identified Charles, this argument would not benefit him.

case?" Carter's counsel objected that the question misstated Detective Ramirez's testimony and was compound and irrelevant. The court overruled the objections, and Detective Ramirez testified, "Their fear was retaliation."

On cross-examination, Carter's counsel elicited from Detective Ramirez that his opinion was not based on anything the victims said to him directly, but based on Brooks's refusal to return phone calls and come into court. In Detective Ramirez's view, Brooks refused to testify because "he feared retaliation. He feared the safety of his family and himself." In the end, Detective Ramirez conceded his opinion was based on what he believed, not based on anything the victims told him.

During a discussion on jury instructions, Carter's counsel objected to Detective Ramirez's opinion that Brooks and Cotton refused to identify Carter out of fear of retaliation, arguing the prosecutor committed misconduct by asking the question and the court erred in allowing the answer because victims' fear was an ultimate issue for the jury. Counsel also moved for a mistrial. The court overruled the objections and denied the mistrial motion, noting Detective Ramirez never gave an opinion on whether appellants were guilty. Carter's counsel requested a jury instruction on expert witnesses, which the court denied because Detective Ramirez was testifying to his own observations when personally dealing with the victims as the investigative officer. The court agreed to give an instruction on lay witness opinions.[4]

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[4] That instruction was based on CALCRIM No. 333 and stated: "A witness who was not testifying as an expert gave his opinion during the trial. You may but are not required to accept those opinions as true or correct. You may give the opinions

Detective Ramirez's opinion on Brooks's and Cotton's state of mind was improper and should not have been admitted. " ' "[E]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to [his] credibility and is well within the discretion of the trial court." ' " (*People v. Adams* (2014) 60 Cal.4th 541, 570 (*Adams*); see *People v. Mendoza* (2011) 52 Cal.4th 1056, 1084 (*Mendoza*).) A lay witness generally may not opine about *another's* state of mind, however; at best, a witness "may testify about objective behavior [of another person] and describe behavior as being consistent with a state of mind." (*People v. Chatman* (2006) 38 Cal.4th 344, 397 (*Chatman*) [witness could opine defendant " 'seemed to be enjoying' " kicking individual because he observed defendant's demeanor during incident].)

Here, Detective Ramirez did not limit his testimony to opining that Brooks's and Cotton's physical demeanor or statements led him to believe they *might* have feared retaliation. He testified directly about their states of mind, which was improper. Our high court found a similar lay opinion improper in *People v. Houston* (2012) 54 Cal.4th 1186 (*Houston*). In that case

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whatever weight you think appropriate. Consider the extent of the witness' opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion and the facts or information on which the witness relied in forming that opinion. You must decide whether the information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable or unsupported by the evidence."

involving a mass school shooting, the defendant claimed to have been molested by one of the teachers he killed. At trial, one of the defendant's friends testified he and the defendant were very close and discussed sexual matters, but the defendant never told him about the alleged molestation. (*Id.* at p. 1199.) The prosecutor asked him, " 'In your opinion based upon the relationship and the type of relationship you had with [defendant], is that the type of thing, having sexual contact with [the teacher], that the defendant would have talked to you about had it occurred?' " The friend testified, " 'Yeah. We were friends. I believe that he would have told me such a thing about [the teacher] touching him or doing anything else. I believe he would have told me.' " (*Id.* at p. 1221.)

The court explained the friend's testimony that he and the defendant often discussed sexual matters and defendant never told him about the molestation was relevant and admissible. The friend also could have testified it would have been normal for them to discuss personal matters, which would shed light on the nature of their relationship. But, the court explained, the friend's testimony "went a step farther. He did not say it would have been normal for defendant to discuss with him the alleged molestation by [the teacher]. Instead, he specifically testified that defendant 'would have told me such a thing.' This statement was speculative and not based on anything [the friend] might have perceived through his physical senses, and his opinion on the matter did not help the jury understand the rest of his testimony. [Citation.] Although it is reasonable to infer that, in light of the nature of their relationship, defendant would have told [the friend] about the alleged molestation by [the teacher], it is the role of the trier of fact, not the witness, to make such an

inference. The trial court should not have permitted [the friend's] specific testimony about what defendant would have told him." (*Houston, supra*, 54 Cal.4th at p. 1222.)

Detective Ramirez's testimony was no different. He testified in his experience victims of violent crime are frequently reluctant to cooperate in investigations. Assuming he was properly qualified, he might have even testified these witnesses often appear to fear retaliation. He might have also properly testified that Brooks and Cotton *appeared* to be scared or reluctant based on his observations of their actions, their physical demeanor, or their comments to him. Indeed, he testified he encountered difficulties contacting Brooks and getting him to appear in court. (See *Chatman, supra*, 38 Cal.4th at p. 397.) But like the testimony in *Houston*, Detective Ramirez could not go a step further and opine that Brooks and Cotton refused to identify Carter because they *actually* subjectively feared retaliation. That was an inference for the jury to draw, so his testimony should have been excluded.

To argue otherwise, respondent cites two lines of cases: one in which witnesses personally testified to their own fear or intimidation (see, e.g., *Adams, supra*, 60 Cal.4th at p. 570; *People v. Abel* (2012) 53 Cal.4th 891, 925; *Mendoza, supra*, 52 Cal.4th at p. 1084; *People v. Burgener* (2003) 29 Cal.4th 833, 869); and another in which gang experts explained why witnesses might generally fear testifying in gang prosecutions (see, e.g., *People v. Nguyen* (2015) 61 Cal.4th 1015, 1035; *People v. Gonzalez* (2006) 38 Cal.4th 932, 945-947; *People v. Ward* (2005) 36 Cal.4th 186, 211). Because Detective Ramirez was neither presented as an expert witness nor testifying about his own state of mind, these cases do not apply here. In any event, in the gang cases our high

court has suggested a gang expert may not opine on whether *specific* witnesses feared testifying or identifying suspects, which is basically what Detective Ramirez did. (See *Nguyen, supra*, at p. 1034 [expert's testimony "described the common behavior of witnesses to gang-related crimes and did not purport to assess the veracity of individual witnesses"]; *Gonzalez, supra*, at p. 947 [expert properly responded to hypothetical questions and "did not express an opinion about whether the particular witnesses in this case had been intimidated"].)

Thus, the court should have excluded Detective Ramirez's opinion on the victims' subjective fear of retaliation.[5]

2. Facebook Photograph of Carter

Joined by Charles, Carter argues the trial court abused its discretion in admitting a photograph downloaded from his Facebook page depicting him holding a revolver. He contends the photograph was irrelevant, lacked foundation, and was unduly prejudicial under Evidence Code section 352. Again, we review the trial court's admission of this evidence for abuse of discretion. (*Goldsmith, supra*, 59 Cal.4th at p. 266.)

Cotton and Brooks described both assailants as carrying guns that resembled revolvers. The one gun recovered was a semiautomatic, however. During his cross-examination of Detective Ramirez, Carter's counsel elicited testimony that Detective Ramirez used the word "gun" instead of "revolver" in his police report even though both Cotton's and Brooks's

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[5] In his opening brief, Carter suggested the prosecutor committed misconduct with her question to Detective Ramirez, but he clarified in his reply brief that he was not arguing a separate claim of prosecutorial misconduct so we need not address it.

descriptions matched revolvers. Carter's counsel appeared to suggest Detective Ramirez was downplaying the fact that officers recovered a semiautomatic gun that did not necessarily match the victims' descriptions.

On cross-examination, Carter's counsel and Detective Ramirez had the following exchange about Cotton:

"Q. [Cotton] told—you read that she told Deputy Arteaga she saw a revolver, correct?

"A. Yes.

"Q. Now, the reason you didn't put 'revolver' in your report is because that doesn't help your case, does it?

"A. No.

"Q. What you found was a semiautomatic handgun, correct?

"A. Yes."

They had the following exchange about Brooks:

"Q. Now, Mr. Brooks also told you that the gun he saw was a revolver; is that right?

"A. I don't recall if he said it was a revolver.

"Q. You didn't write he said it was a revolver in your report, right, just like with Ms. Cotton. You wrote that Mr. Brooks told you the suspect pointed a gun at his head without specifying what kind of gun, correct?

"A. Yes. [¶] . . . [¶]

"Q. . . . And the same reason you did that—the reason you just wrote 'gun' instead of 'revolver' is the same reason you did with Ms. Cotton in the report is because you didn't have a revolver in evidence; isn't that right?

"A. I do not—we do not have a revolver in evidence, correct."

On redirect examination, the prosecutor asked Detective Ramirez if he had done any followup investigation to see if he could locate a revolver. Detective Ramirez responded, "I searched the defendant's Facebook." At that point, Carter's counsel objected and the parties and the court went to sidebar.

Carter's counsel anticipated the prosecutor would introduce a photograph from Carter's Facebook page that appeared to depict Carter holding a revolver. He argued the photograph lacked foundation and was irrelevant and prejudicial. The prosecutor responded the photograph had adequate foundation because it was clearly Carter holding a revolver, and it rebutted Carter's counsel's attack on the integrity of Detective Ramirez's investigation. She also argued the photograph was relevant because both witnesses described a revolver-type weapon and it showed Carter had access to such a weapon. And she contended Carter's counsel opened the door to the introduction of the photograph with his cross-examination.

Carter's counsel denied he attacked Detective Ramirez's search for a revolver and clarified he was attacking his police report as misleading by leaving out the word "revolver." He also contended there was no evidence when or where the photograph was taken or even if the gun was real. If the gun was real, he argued Carter had a right to possess it.

The court rejected Carter's counsel's arguments: "Okay. I disagree. I think because a revolver is at issue in this case, then it's up to the jury to give it whatever weight it deserves as long as everything is redacted except the picture itself so we don't have any foundational issues and then [Carter's counsel] can make whatever arguments he wants as [the prosecutor] can. [¶] But I'm going to require everything that's not relevant—and nothing

is relevant except for the actual photo and the picture of the revolver if that's what it is or purports to be. Everything else needs to be redacted." The court also prevented the prosecutor from asking any gang-related questions.

Carter's counsel again argued the photograph lacked foundation because no one knew when it was taken. He contended, "He is accused of using—committing a crime so that means any picture of him ever with a revolver is relevant? It just doesn't make sense." The court responded it was up to the jury to decide if the photograph showed Carter and showed a revolver and whether the photograph was relevant based on the facts in the case. The court also ensured everything related to Facebook would be redacted and Detective Ramirez's last answer referring to Facebook would be stricken. And the court indicated defense counsel could question where and when the photograph was taken.

In front of the jury, Detective Ramirez was shown the photograph and testified it depicted Carter holding a revolver that looked "exactly like the type of backup weapon we carry on duty." He acknowledged the gun was not fully in the frame. He gave no details to the jury as to where he obtained the photograph. Neither defense counsel asked any questions about the photograph on recross-examination.

In his closing statement, Carter's counsel argued the photograph was irrelevant and had no probative value because it was undated and Detective Ramirez never showed the photograph to the victims so they might identify the gun as one used in the carjacking. Consistent with his cross-examination of Detective Ramirez, Carter's counsel also pointed out Detective

Ramirez did not write "revolver" in the police report even though the victims described revolvers.

On appeal, Carter again argues the photograph was inadmissible because it lacked foundation and was irrelevant and unduly prejudicial. We agree it lacked sufficient foundation, so we need not decide if it was relevant or unduly prejudicial under Evidence Code section 352.

Our high court recently clarified the foundation necessary to admit photographic evidence to the jury. (See *Goldsmith, supra*, 59 Cal.4th at pp. 266-272.) Authentication is a preliminary fact determined by the court, and it is statutorily defined as " 'the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' or 'the establishment of such facts by any other means provided by law' [citation]." (*Id.* at p. 266.) The proof necessary to authenticate a photograph "varies with the nature of the evidence that the photograph or video recording is being offered to prove and with the degree of possibility of error. [Citation.] The first step is to determine the purpose for which the evidence is being offered. The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. [Citation.] The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. [Citation.] Essentially, what is necessary is a prima facie case. 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' " (*Id.* at p. 267.)

The prosecutor cited two reasons why she wanted to introduce the photograph. First, it rebutted Carter's counsel's attack on Detective Ramirez's police report that did not specifically mention a revolver. For this purpose, only the most basic foundation was necessary, namely that Detective Ramirez searched for and located the photograph that he believed depicted Carter holding what appeared to a revolver. From that, the jury could infer that Detective Ramirez did not use the more general term "gun" in his police report to gloss over a weakness in the case—that the victims described revolvers while police recovered a semiautomatic. For this purpose, it did not matter when or where the photograph was taken or whether the photograph *actually* depicted Carter or *actually* depicted a revolver. It was sufficient that Detective Ramirez believed it did.

But the prosecutor also sought admission of the photograph to corroborate the victims' description of the perpetrators using revolvers and to show Carter had access to a revolver. For these purposes, the prosecutor had to lay a sufficient foundation for the jury to infer the photograph actually depicted Carter holding a revolver. The prosecutor failed to do so.

"A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. [Citations.] This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citations.] It may be supplied by other witness testimony, circumstantial evidence, content and location." (*Goldsmith, supra*, 59 Cal.4th at pp. 267-268.)

The court in *People v. Beckley* (2010) 185 Cal.App.4th 509 (*Beckley*) found a photograph obtained from social media

depicting an individual flashing a gang sign lacked adequate authentication because there was no evidence it was what the prosecution claimed it was. (*Id.* at p. 515.) The detective testified he obtained it from the defendant's MySpace account, but he had no personal knowledge the photograph accurately depicted the individual flashing the gang sign, and no expert testified it was not manipulated. (*Ibid.*)

This case is at least as weak as *Beckley* because the court excluded any evidence that would have allowed the jury to conclude the photograph was what the prosecution represented. Once the trial court concluded a prima facie case of foundation existed, the jury was required to make the "ultimate determination of the authenticity of the evidence" by "consider[ing] any rebuttal evidence and balance[ing] it against the authenticating evidence in order to arrive at a final determination on whether the photograph, in fact, is authentic." (*In re K.B.* (2015) 238 Cal.App.4th 989, 997 (*K.B.*).) But the trial court *excluded* evidence that Detective Ramirez obtained it from Carter's Facebook page. At least in *Beckley* the jury was told the photograph came from the defendant's MySpace page. Here, the jury was presented with a photograph completely devoid of any context from which it could determine whether the photograph accurately depicted Carter holding a revolver. The jury could not discharge its duty to determine authenticity on this record.[6]

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[6] In *K.B.*, the court suggested *Beckley* conflicted with *Goldsmith* to the extent it required "a conventional evidentiary foundation to show the authenticity of photographic images appearing online, i.e., testimony of the person who actually created and uploaded the image, or testimony from an expert witness that the image has not been altered." (*K.B., supra*, 238

Respondent contends the photograph of Carter with the revolver is "self-authenticating" because Carter did not dispute he was the one depicted or that it came from his Facebook page. Even if the photograph did depict him and came from his social media account, Carter vehemently disputed when and where the photograph was taken and whether it depicted him holding a real gun. A concession that he was the one in the photograph did nothing to rebut these concerns, so the content of the photograph did not render it "self-authenticating." (Cf. *Goldsmith, supra*, 59 Cal.4th at pp. 271-272 [in traffic violation case, counsel conceded photograph from red light camera accurately depicted defendant at intersection].)

Respondent also cites several cases finding adequate foundation for photographs, but they involved significantly more evidence than presented here. For example, in *K.B.*, officers extracted the photographs at issue directly from a suspect's cell phone, which matched photographs obtained by officers from

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Cal.App.4th at p. 997.) *Goldsmith* involved photographs and video from a red light camera, and the court distinguished *Beckley* "because the issue there concerned the admission of a photograph found on a social media Web site, which presented questions of accuracy and reliability different from the evidence here." (*Goldsmith, supra*, 59 Cal.4th at pp. 272-273, fn. 8.) The court emphasized these differing factual scenarios "serve to demonstrate the need to carefully assess the specific nature of the photographic image being offered into evidence and the purpose for which it is being offered in determining whether the necessary foundation for admission has been met." (*Ibid.*) In any case, the Facebook photograph of Carter lacked any of the evidence mentioned in either *Beckley* or *Goldsmith* to establish foundation.

Instagram and had time stamps of approximately five hours before the defendant was arrested. The same photographs were posted on the defendant's own Instagram account, which required a username and password. And when the defendant was arrested, he was wearing the same clothes and found in the same location as depicted in the photographs. (*K.B., supra*, 238 Cal.App.4th at pp. 997-998.)

In *People v. Valdez* (2011) 201 Cal.App.4th 1429, the court approved the admission of printed pages from the defendant's MySpace page depicting written gang notations and the defendant making gang hand signals. The investigator who found the page testified he did not know who uploaded the photographs to MySpace, but he testified only the person who created the MySpace profile could post on the page. (*Id.* at pp. 1433-1434.) The defendant also did not dispute the page belonged to him or that he appeared in the photographs, and the overall content of the pages corroborated that he was making gang signs with his hands. (*Id.* at pp. 1435-1436.)

Thus, lacking adequate foundation, the photograph should not have been admitted.

3. Harmless Error

Having found two evidentiary errors, we must decide whether those errors rendered it reasonably probably appellants would have received a more favorable outcome in the absence of these errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

For Charles, there is no question the errors were harmless. Both victims identified him as a perpetrator, and Detective Ramirez's improper opinion related only to the victims' identification of Carter. The Facebook photograph only depicted

Carter, so it would have had little to no impact on the jury's deliberations with regard to Charles.

For Carter, Detective Ramirez's opinion was duplicative of evidence that at least Brooks was afraid to testify, given Brooks himself admitted he did not attend prior court hearings because he "[d]idn't want to take a risk" of "anything bad happening to me or my family" and he was still afraid at trial. From that evidence, jurors could have inferred Brooks's identification of Carter changed due to fear of retaliation, even without Detective Ramirez drawing that inference for them.

Further, the evidence showing Carter as a perpetrator was overwhelming, notwithstanding Detective Ramirez's opinion or the Facebook photograph of Carter with the revolver. Circumstantial evidence directly linked Carter to the carjacking: he was driving Cotton's car several hours later with Charles, whom the victims unequivocally identified as one of the carjackers; he fled when engaged by police; he had Cotton's check cashing identification card in his pocket; and he had bullets on him that matched the gun recovered after Charles told the police where to find it.

Brooks also picked Carter out of the photographic six-pack the day after the carjacking. At that time Brooks was around 80 percent sure Carter was the perpetrator. Although Brooks claimed at trial Carter was not one of the carjackers, he acknowledged Carter was the person he identified in the photographic lineup, and he would not have identified an innocent person. In the face of the circumstantial evidence linking Carter to the carjacking, Brooks's identification of Carter was beyond rational coincidence. And as noted, there was evidence Brooks was afraid to come into court and testify, which

explained why his identification changed over time. On this record, there is no reasonable probability Carter would have obtained a more favorable outcome in the absence of Detective Ramirez's improper opinion testimony and the photograph of him holding a revolver.

4. Reasonable Doubt Instruction

Charles argues the trial court's reasonable doubt instruction based on CALCRIM No. 220 violated his due process rights because it did not expressly instruct the jury it had to find the prosecution proved *each element* of the crimes at issue beyond a reasonable doubt. Instead, the instruction told the jury in relevant part, "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt." Other instructions set forth the elements that the prosecution must prove for the charged crimes and enhancements.

We review the correctness of jury instructions de novo. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) *Ramos* and other cases have rejected Charles's exact challenge to CALCRIM No. 220. (*Ramos, supra*, at p. 1088; see *People v. Riley* (2010) 185 Cal.App.4th 754, 770; *People v. Henning* (2009) 178 Cal.App.4th 388, 406; *People v. Wyatt* (2008) 165 Cal.App.4th 1592, 1601.) As these cases explain, the combination of the language in CALCRIM No. 220 and the instructions indicating the prosecution must prove each element of the offenses and enhancements adequately informed the jury it must find the elements beyond a reasonable doubt. (See *Ramos, supra*, at pp. 1088-1089.) We reject Charles's argument the use of the word

"something" renders the instructions "awkward[]" or that reasonable jurors would not understand they are required to find every element of the crimes beyond a reasonable doubt. Seeing no reason to depart from existing authority, we reject his challenge.

DISPOSITION

We affirm the judgments.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.